ORIENTAL WEALTH (M) SDN BHD *a*

v.

NAKANO (MALAYSIA) SDN BHD

COURT OF APPEAL, KUALA LUMPUR *b*
NH CHAN JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: Q-02-256-1998]
2 MAY 2001 *c*

CIVIL PROCEDURE: *Stay of proceedings - Stay of proceedings pending arbitration - Whether a dispute existed - Whether there was a failure to give notice in writing pursuant to arbitration clause - Whether applicant ready and willing to do all things necessary to the proper conduct of arbitration - Arbitration Act 1952, s. 6* *d*

ARBITRATION: *Stay of proceedings - Stay of proceedings pending arbitration - Whether a dispute existed - Whether there was a failure to give notice in writing pursuant to arbitration clause - Whether applicant ready and willing to do all things necessary to the proper conduct of arbitration - Arbitration Act 1952, s. 6* *e*

This was an appeal against the decision of the High Court dismissing the appellant's application made pursuant to s. 6 of the Arbitration Act 1952 ('Act') for a stay of all further proceedings of the respondent's suit against the appellant. The respondent had commenced the said suit to claim for monies *f* owed by the appellant for certain completed works. The agreement between the parties provided an arbitration clause (cl. 43) which required any dispute or difference between them to be referred for arbitration. Notice in writing had to be given by either party.

The appellant claimed that the works done were defective and that the *g* respondent admitted the defects and was willing to rectify them. The appellant also claimed, firstly that there was no prior notice of the respondent's intention to discontinue negotiation; secondly that the issuance of the writ had taken the appellant by surprise; and lastly that the appellant was willing to let the respondent rectify the defects. *h*

The respondent argued that there was really no dispute and that it was prepared to carry out remedial works if given access to the premises. It further claimed that no written notice as required under cl. 43 had been given by the appellant to the respondent and that no evidence was given by the appellant that it was *i* willing to arbitrate.

The issue before the court was whether the ingredients for granting a stay were satisfied *ie*, whether there existed a dispute for arbitration, whether a notice in writing of dispute, if any, had been given under cl. 43, and whether the appellant was ready and willing to do all things necessary to the proper conduct of the arbitration under s. 6 of the Act.

Held:
Per Denis Ong JCA

[1] The complaints of disconformity with the specifications were eventually resolved to the satisfaction of both sides. There could no longer be said to be any controversy or dispute as to the defects in the works, the remedial works to be undertaken, who was to carry out and complete them and also be liable for the costs. Until remedial works had been carried out by the respondent and the value ascertained it would be premature to assert that there was a dispute as to the amount.

[2] It was common ground that there was no notice in writing of any dispute given under cl. 43. From the date of issuance of the letter of demand to the date of issue of the writ, there was a period of six months. Six months was more than ample time to give such notice and the appellant could not validly complain of lack of time or opportunity to give notice.

[3] The excuse that the writ of the respondent took the appellant by surprise was not a good excuse. The letter of demand by the respondent claiming for the sum unpaid gave final notice to the appellant.

[4] It was clear that the appellant confused willingness to let the respondent rectify the defects when the writ was taken out with willingness to do all things necessary to the proper conduct of arbitration.

[5] The lack of a notice under cl. 43 and of a statement of the appellant's readiness and willingness to do all things necessary for the proper conduct of the arbitration under s. 6 of the Act stemmed from the basic lack of dispute to be referred to arbitration.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi menolak permohonan perayu yang dibuat selaras dengan s. 6 Akta Timbangtara 1952 ('Akta) untuk satu penangguhan akan kesemua prosiding yang selanjutnya daripada satu guaman responden terhadap perayu. Responden telah memulakan guaman tersebut untuk menuntut wang yang terhutang oleh perayu untuk kerja tertentu yang telah siap. Perjanjian di antara kedua pihak tersebut memperuntukkan satu

fasal timbangtara (fasal 43) yang memerlukan sebarang pertikaian atau perbezaan antara pihak-pihak tersebut dirujuk untuk timbangtara. Notis bertulis haruslah diberikan oleh mana-mana satu pihak.

Perayu menuntut bahawa kerja yang telah dilakukan tidak sempurna dan bahawa responden telah mengakui ketidak-sempurnaan tersebut dan bersedia untuk memperbaikinya. Perayu juga menuntut, pertamanya bahawa tidak terdapat notis yang terdahulu mengenai niat responden untuk memberhentikan perundingan; keduanya, bahawa pengeluaran writ telah memeranjatkan perayu; dan akhirnya bahawa perayu bersedia untuk membenarkan responden memperbaiki ketidak-sempurnaan tersebut.

Responden berhujah bahawa sesungguhnya tidak terdapat sebarang pertikaian, dan bahawa ia bersedia untuk menjalankan kerja-kerja pembaikan jika diberi kebenaran untuk memasuki premis berkenaan. Ia selanjutnya menuntut bahawa notis bertulis sepertimana yang dikehendaki di bawah fasal 43 telah tidak diberikan oleh perayu kepada responden dan bahawa tiada keterangan telah diberikan oleh perayu bahawa ia bersedia untuk menimbangtara.

Isu di hadapan mahkamah adalah samada perkara-perkara untuk memberikan satu penggantungan telah dipenuhi, iaitu sama ada wujudnya satu pertikaian untuk timbangtara, samada satu notis bertulis mengenai pertikaian, jika ada, telah diberikan di bawah fasal 43, dan samada perayu bersedia dan rela untuk melakukan segala perkara yang perlu untuk mengendalikan dengan sempurna timbangtara tersebut di bawah s. 6 Akta tersebut.

Diputuskan:
Oleh Denis Ong HMR

[1] Aduan mengenai ketidak-patuhan spesifikasi akhirnya telah diselesaikan mengikut kehendak kedua-dua pihak. Tidak lagi boleh dikatakan wujudnya sebarang kontroversi atau pertikaian berhubung dengan ketidak-sempurnaan dalam kerja tersebut, kerja-kerja pembaikan untuk dijalankan, siapakah yang harus menjalankan dan menyiapkannya dan juga yang bertanggungan bagi kos. Sehingga kerja-kerja pembaikan dijalankan oleh responden dan nilainya ditentukan ianya pra-masa untuk menegaskan bahawa terdapatnya satu pertikaian berhubung dengan jumlah tersebut.

[2] Ianya adalah alasan bersama bahawa tidak terdapat notis bertulis mengenai sebarang pertikaian yang diberikan di bawah fasal 43. Tarikh pengeluaran surat tuntutan sehingga kepada tarikh pengeluaran writ, terdapatnya tempoh selama enam bulan. Enam bulan adalah tempoh yang lebih dari mencukupi untuk memberikan notis yang sedemikian dan perayu tidak boleh secara sahnya mengadu mengenai ketiadaan masa atau peluang untuk memberikan notis.

[3] Alasan bahawa writ responden telah memeranjatkan perayu bukannya satu alasan yang baik. Surat tuntutan oleh responden menuntut jumlah yang tidak dibayar memberikan notis terakhir kepada perayu.

[4] Ianya jelas bahawa perayu terkeliru dengan kerelaan untuk membiarkan responden memperbaiki ketidak-sempurnaan tersebut apabila writ dikeluarkan dengan kerelaan untuk melakukan segala perkara yang perlu bagi pengendalian sempurna timbangtara tersebut.

[5] Ketiadaan notis di bawah fasal 43 dan pernyataan mengenai ketersediaan dan kerelaan perayu untuk melakukan segala perkara yang perlu untuk pengendalian sempurna akan timbangtara tersebut di bawah s. 6 bermula daripada ketiadaan pertikaian pada asasnya untuk dirujukkan kepada timbangtara.

[Rayuan ditolak.]

Case(s) referred to:

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1993] 3 MLJ 309 ***(refd)***

Pitchers Ltd v. Plaza (Queenbury) Ltd [1940] 1 All ER 151 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 2, 6

For the appellant - Benny Zaidy Jalil; M/s John Shek & Co
For the respondent - Albert Tang Yew Liong; M/s Chew, Jugah, Wan Ullok & Co

Reported by Sherin Kunhibava

JUDGMENT

Denis Ong JCA:

This is an appeal from the judgment of Hj. Muhammad Kamil bin Awang J dismissing a summons in chambers application made by the defendant (the appellant) under s. 6 of the Arbitration Act 1952 (Act 93) for a stay of all further proceedings in suit no: 22-108-97-III (II) commenced by the plaintiff (the respondent) in Kuching High Court II. We heard this appeal on 9 November 1998 at the conclusion of which both learned counsel were orally informed of our unanimous decision that it was dismissed with costs and that the deposit be paid to the respondent towards the account of taxed costs.

By an agreement in writing dated 18 July 1996 (the agreement) made between the appellant as employer and the respondent as contractor, the latter contracted to carry out and complete the construction of 20 units of detached factory buildings on lots 996 to 1015, Block 7, Muara Tebas Land District (the Works)

located at the Demak Laut Industrial Park Kuching Sarawak for a contract sum of RM15,250,000.

The agreement was in the format of the Sarawak Public Works Department Form of Agreement. By art. 2 thereof, the PWD General Conditions of Contract for use where bills of quantities do not form part of the contract (the GCC) and the PWD Specifications of contract were, amongst others, deemed to form and to be read and construed as part of the agreement. Of these, only the Form of Agreement and the GCC were included in the appeal record. The GCC defined "Government" or "Employer" to mean Oriental Wealth (M) Sdn. Bhd; "Engineer" or "Divisional Engineer" to mean the Managing Director of Oriental Wealth (M) Sdn Bhd. or any other person duly authorised and appointed in writing by him for the purpose of the contract; and, "Director of Public Works" to mean the Managing Director of Oriental Wealth (M) Sdn. Bhd. These definitions must be taken to have been made in substitution for the definitions of the same terms contained in cl. 1 of the GCC, although not expressly deleted. In addition, cls. 29(vii), 37 and 38 of the GCC were expressly deleted.

The respondent carried out the works. Interim certificate nos. 1 to 7 were issued by the appellant's architect namely, Architect Design Practice (ADP) on diverse dates and payment made belatedly by the appellant were received by the respondent. However, despite repeated reminders, no payment was made by the appellant to the respondent under interim certificate nos. 8 and 9 issued on 9 November 1996 and 19 January 1997 respectively for an aggregate sum of RM2,754,659.27.

On 28 January 1997 the keys to six units on lots 1010 to 1015 were handed over by the respondent to the appellant who acknowledged receipt by its authorised personnel.

On 2 April 1997 the certificate of practical completion was issued and it certified that practical completion of the works was achieved on 4 February 1997.

On 4 April 1997 the keys to the remaining 14 units on lots 996 to 1009 were handed over by the respondent to ADP who acknowledged receipt.

On 2 June 1997 the respondent by its solicitors Messrs. Azman, Davidson & Co. wrote a letter of demand to the appellant for the payment of the aggregate sum overdue under interim certificate nos. 8 and 9. The letter also gave final notice that unless payment was received within 14 days legal proceedings would be commenced against the appellant.

On 17 June 1997 interim certificate no. 10 was issued by ADP for the payment of a sum of RM1,450,800.51 to the respondent.

There was no response from the appellant to the letter of demand and no payment whatever was received by the respondent under interim certificate nos. 8, 9 and 10 which altogether added up to RM4,205,459.78.

On 2 December 1997 the respondent instituted suit no: 22-108-97-III (II) in the Kuching High Court to recover the payments due under interim certificate nos. 8, 9 and 10; alternatively, for damages for breach of contract, and for interest and costs.

On 20 December 1997 the appellant by its advocates Messrs. John Shek & Co. entered unconditional appearance in the action and on 15 January 1998 applied under s. 6 of Act 93, by way of summons in chambers supported by an affidavit, to stay all further proceedings in the said suit. A number of affidavits and counter affidavits were filed by the parties the last of which affirmed by Chan Chee Khuen was on 15 April 1998.

The summons application was fixed for hearing initially on 25 February 1998 but was adjourned until 23 April 1998. At the resumed hearing, learned counsel on both sides put in submissions in writing which were admitted into the court file and formed part of the appeal record. At its conclusion on the same day, the learned judge orally dismissed the application with costs.

On 25 April 1998 he gave the grounds of his decision in writing.

Site inspections by ADP involving representatives of both parties were held as early as 21 December 1996 with a view to sort out the defects in the works and the measures to rectify them. Final site inspection was fixed for 7 May 1998 in respect of the last 17 units constructed. But it was not known if it was in fact carried out. As at the date of hearing of the appeal, interim certificate nos. 8, 9 and 10 remain unpaid to the respondent.

It is noteworthy here to record that interim certificate nos. 8, 9 and 10 and the appendix to the agreement were not included in the appeal record.

So much for the facts and background of undisputed events against which the summons application for stay was made.

The ground stated in the summons application was that the parties had by agreement dated 18 July 1996 agreed to refer to arbitration the matters in respect of which the action was brought and such other grounds stated in the supporting affidavit of Chan Chee Khuen affirmed on 15 January 1998.

Section 6 so far as is relevant to the facts and circumstances of this appeal provides thus:

> If any party to an arbitration agreement ... commences any legal proceedings against any other party to the arbitration, ... in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

In relation to s. 6, there appeared to have been common ground before the learned judge that cl. 43 of the GCC was an "arbitration agreement" within the meaning of that expression as defined in s. 2 of Act 93; that suit no: 22-108-97-III (II) was a legal proceeding commenced in the High Court at Kuching by the respondent who was also a party to the arbitration agreement; that the appellant was a party to such arbitration agreement and legal proceeding; and lastly that the application was made after the appellant had entered appearance but before it had taken any other step in the legal proceeding.

Clause 43 so far as is relevant provides thus:

> 43. Provided always that in case any dispute or difference shall arise between the Employer ... and the Contractor, either during the progress or after the completion ... of the Works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (...), then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed upon between the parties in accordance with and subject to the provisions of the Arbitration Ordinance, and the award of such Arbitrator shall be final and binding on the parties. Such reference, ..., shall not be opened until after the completion or alleged completion of the Works, unless with the written consent of the Employer ... and the Contractor ...

The question for decision was whether or not the application for stay should be granted.

The particular issues between the parties at the hearing before the learned judge and before us were:

a) whether there was a dispute as to the amounts certified in interim certificate nos: 8, 9 and 10 or a notice in writing of any dispute given under cl. 43;

b) whether the appellant was and is ready and willing to do all things necessary to the proper conduct of the arbitration.

Both these issues were raised by the respondent. The learned judge considered the issue in (b) first followed by that in (a).

The judge found that:

(a) there was no dispute by the employer, plain and obvious or by way of inference from the evidence, as to the amounts certified in interim certificate nos. 8, 9, and 10 and that no notice in writing of any dispute was in fact given by the appellant pursuant to the provisions of cl. 43: further, refusal by the employer to pay the certified amounts did not give rise to a "dispute" under that clause; and,

(b) under s. 6, the onus was on the appellant (as the applicant) to satisfy the court that at the commencement of the civil suit, it was and still remains ready and willing to do all things necessary to the proper conduct of the arbitration and that the appellant failed to so satisfy the court in the absence of any statement by it in that regard in any of its four affidavits filed in support of its summons application.

On those findings the judge decided that the application for stay be dismissed with costs to the respondent to be taxed unless agreed.

In arriving at the finding in (a) the judge gave his reasons at pp. 20 to 21 of the appeal record thus:

> 14. The plaintiff's claim is for the sum of RM4,205,459.78 being the aggregate sum under payment certificates no. 8, 9 and 10. Under clause 35(a) of the General Conditions of Contract it is mandatory that the defendant shall pay the sum in 14 days. In so far as the quantum of the sums is concerned there is no dispute of difference with respect of the plaintiff's claim.
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> 15. Under clause 43, the existence of a dispute or difference is a condition precedent to the right to arbitrate.
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> 16. The Law and Practice of Commercial Arbitration in England by Sir Michael J. Mustill and Stewart C. Boyd, London Butterworth 1982 at page 90, referring to undisputed claims:
>
> > First, an action can properly be brought in the High Court in respect of an admitted claim, even though the contract contains an arbitration clause. The claimant may apply for summary judgment, under RSC Ord. 14, and the defendant cannot either fend off judgment or obtain a stay simply by relying on the arbitration clause; for unless there is a dispute, there is nothing to be referred to arbitration. The same principle applies to a claim which is partly admitted: the claimant is entitled to judgment on the admitted portion, and a stay will be granted as to the remainder.
> >
> > Where the defendant has not actively admitted the claim, but has so far failed to deny it, it would seem that there is no "dispute" then in existence, and the claimant not only can but must prosecute his claim

by action, rather than by arbitration. Moreover, if he really believes that the defendant is saying nothing because he has nothing to say, he can apply for summary judgment.

17. In a classic case of *London and North Western Joint Railway Companies v. JH Billington Ltd* [1899] AC 79, where:

A Railway Act confirming a Provisional Order, after empowering the railway company to charge a reasonable sum for certain services rendered to a trader, by way of addition to the tonnage rate, enacted that 'any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of the other party.' The company having sued the respondents for services under this section, the respondents objected to the jurisdiction of the Court on the ground that the matter was one for the arbitrator to determine:

Held: that as there had been no difference existing between the parties before action brought the arbitrator had not and the Court had jurisdiction.

18. From the evidence, there is no dispute as to the amount claimed, and mere refusal to pay upon a claim does not necessarily give rise to a dispute calling an arbitration clause into operation *(Elf Petroleum S.E. Asia, supra)*.

For the finding in (b), the judge stated his reasons at pp. 18 to 19 of the appeal record thus:

6. It is clear that under section 6 to succeed in an application for a stay of proceedings, the defendant has to satisfy the court that at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. There are a number of case-law on this point. (In paragraphs 7, 8, 9 and 10 the judge referred to the cases of *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400 (SC), *Lee Brothers Construction Co v. The Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 (HC), *AR Fernandez & Ors v. National Union of Bank Employees* [1986] 2 MLJ 135 (FC), and *San Kong Letrik Sdn Bhd v. Lembaga Letrik Negara Tanah Melayu & Anor* [1992] 1 CLJ 190; and in paragraph 11, he quoted *Halsbury's Laws of England,* 4th ed, vol 2 para 564 as authorities for the statement of the law in his paragraph 6).

Applying the principles to the case, the defendant herein filed 4 affidavits, all of Chan Chee Khuen dated 15 January, 1998 (annexed to the defendant's application) paragraph 31 (page 8); of the 14th February, 1998 (encl. 22) paragraph 7 (page 2); of the 7th March, 1998 (encl. 35) paragraph f (page 3) and of the 15th April, 1998 (encl. 46) paragraph 12 (page 5). Nowhere in any of the affidavits was it stated that the defendant was, at the commencement of the proceedings, and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

13. Therefore, the defendant has not satisfied the court on this point, and on this ground alone, the defendant's application is untenable.

A complaint by the appellant which was germane to all four grounds of appeal was the failure allegedly by the judge to take into consideration the contemporaneous correspondence exhibited to the affidavits of both parties. In his brief submission in writing to us, learned counsel for the appellant stated that such correspondence showed clearly that:

(i) (a) the appellant disputed the work done in that the factory buildings were not constructed in accordance with the specifications and were thus defective. (b) Such a dispute, he submitted was a dispute as to the amount claimed by the respondent.

He claimed that the respondent admitted the defects in the Works and were willing to rectify them (ground 3):

(ii) between the issuance of the letter of demand and of the writ of summons, he contended that the respondent continued to negotiate with the appellant; that there was no prior notice of the respondent's intention to discontinue to negotiate; and that the issuance of the writ had taken the appellant by surprise. As such, his contention was that the appellant had no opportunity to refer the dispute to an arbitrator by giving a notice under clause 43 (ground 2):

(iii) when the writ was issued, the appellant was still willing to let the respondent rectify the defects (grounds 1 and 4).

Learned counsel for the respondent in his written submission to us responded:

on point (i), that there was really no dispute but a deliberate attempt by the appellant to create issues to delay payment of the certified sums under interim certificate nos: 8, 9 and 10. His contention was that complaints of defects in the Works and remedial works were relevant only during the defects liability period commencing from the date of practical completion. The only outstanding defective works were those certified by the appellant's architects in Architect's Instruction dated 14/4/1998. The respondent indicated that it was prepared to carry out remedial works for the amount of the retention sum or less if it was given access to the premises and also that the appellant settle the debt outstanding under the three interim certificates. But the appellant denied or delayed access by workmen of the respondent into the premises to remedy the defects. Thus the complaint of defective work was really a sham or an excuse to delay payment to the respondent of the amounts so certified:

on point (ii), that clause 43 required a notice of the dispute or difference to be given by the appellant to the respondent. No such notice was given; consequently, clause 43 had not been invoked. He supported the conclusion of the judge that there was no dispute or difference respecting the three interim certificates and added that the appellant never informed the respondent that those certificates were not in order in any way. Whether or not the appellant was taken by surprise by the issuance of the writ was not a ground for the application for stay. Consequently, he submitted that it was unnecessary to consider that point:

on point (iii), that it is settled by Malaysian case law that the applicant for a stay under s. 6 must, on a point of fact, depose in its affidavit that it was at the time when legal proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration and that there is no such deposition of fact by the appellant in any of its affidavits.

From these submissions it was clear to us that if there was any dispute to be referred to arbitration, such dispute was narrowed down to the amounts certified by ADP in interim certificate nos. 8, 9 and 10. In short, the appellant's attack was directed not on the correctness of the judge's finding in the last full sentence of para. 14 that was to say, that there was no plain and obvious dispute targetted on the amounts certified in interim certificate nos. 8, 9 and 10 respectively which must be taken to have been accepted by the appellant, but directed solely on para. 18 quoted above that was to say, that from the evidence, the inference was that there was a dispute as to the amounts certified.

From these submissions too, it was clear to us that both parties accepted that there were some work done which did not conform to the specifications. These defects in the works were the subject matter of a technical report dated 18 August 1997 by Veritech Appraisal (Malaysia) Sdn. Bhd, an engineering appraisal company employed by the respondent with the acquiescence of the appellant to investigate the defects and to propose remedial measures. In its report at pp. 176-187 of the appeal record, Veritech listed these defects under four headings namely:

(1) defects on reinforced concrete floor slabs;

(2) defects on roof steel trusses;

(3) defects on concrete aprons and perimeter drains; and

(4) defects on premix carriageway.

It made recommendations to remedy such defects and advised that they be dealt with under cl. 19 of the GCC which provided for defects after completion. There was no disagreement by either party with the findings and recommendations of Veritech which were implemented by ADP and Jurutera Minsar Consult Sdn. Bhd the consulting engineers employed by the appellant for the works.

On 14 April 1998 ADP issued an Architect's Instruction to the respondent to rectify the defects in architectural, civil and structural works in respect of the units in lots 1006, 1008 and 1010 following final site inspection of them made on 13 February 1998.

By para. 2 of its covering letter to the appellant dated 15 April 1998 ADP informed that in addition to the Architect's Instruction it had also directed the respondent to make good the defects on all the units particularised by Veritech in its report entitled "Engineering Assessment on Cracks Through Reinforced Concrete Slabs" and urged the appellant to permit access for the respondent to rectify the defects in those units expeditiously.

By paras. 3 and 4 of the same letter ADP requested the appellant for the third time for access to the other 17 units not later than 21 April 1998 for final site inspection and also for the appellant to do remedial works. Access for final site inspection was fixed for another date namely, 7 May 1998 stated in the reply dated 15 April 1998 of the appellant's advocates.

Under cl. 19 of the GCC, the obligation and liability to make good the defects were on the respondent. The issuance of the Architect's Instruction dated 14 April 1998 undoubtedly made under cl. 19 fixed liability on the respondent to make good the defects listed therein in respect of the three units. In respect of the remaining 17 units, it was not known whether final site inspection was actually carried out and if so, whether an Architect's Instruction was issued by ADP for remedial works.

The position as we understood from these submissions and the contemporaneous correspondence was that both parties accepted that there were some work done which did not conform to the specifications. Counsel for the appellant claimed that the respondent admitted the defects in the works and were willing to rectify them. Counsel for the respondent did not deny this. Instead he confirmed that the respondent was prepared to carry out remedial works for the amount of the retention sum or less on two conditions:

(a) that the respondent be given access to the premises; and

(b) that the appellant settle the debt out-standing under interim certificate nos. 8, 9 and 10.

In the light of the above, we concluded that whatever complaints of disconformity with the specifications there were, were eventually resolved to the satisfaction of both sides so that by 14 or 15 April 1998 (the dates of the Architect's Instruction and the reply of the appellant's advocates) or by 23 April 1998 (the date of resumption of hearing of the summons application) there could no longer be said to be any controversy or dispute as to the defects in the works, the remedial works to be undertaken, who was to carry out and complete them and also be liable for the costs.

Until such remedial works had been carried out by the respondent, certified by ADP to have been completed, measured and the value or amount ascertained in terms of ringgit and sen, it was obvious to us that it would be premature to assert as counsel for the appellant asserted that there was a dispute as to the amount. Here we also took into account the respondent's confirmation which covered both liability and quantum for the remedial works to the extent of the retention sum. Exactly what was the limit of the retention sum and whether it would be exceeded by the costs of remedial works were not disclosed as the appendix to the agreement was not included in the appeal record. Further, ADP had by the same Architect's Instruction indicated that the costs of such remedial works would be dealt with where applicable by way of adjustment of the contract sum in accordance with the GCC.

Having regard to the fact that interim certificate no. 10 was a penultimate certificate so confirmed by counsel for the respondent at the hearing and also the fact that the certificate of practical completion had been issued, as we saw it, any adjustment of the contract sum could only be made by way of revision of the contract sum (upwards or downwards as the case might be) in the final certificate after settlement of the final accounts – not by way of revising the amounts certified in interim certificate nos. 8, 9 and 10.

In the premises we found no merit in point (i)(a) and (b) of the submission of counsel for the appellant.

Possession of the site having been handed back by the respondent to the appellant, signified by the handing over of the keys to the 20 units on 28 January 1997 and 4 April 1997 and the defects liability period having expired, it was imperative that the respondent be allowed access to the units once more to remedy the defects. Hence condition (a) of counsel for the respondent. In this connection ADP, as mentioned earlier, had made a specific request to the appellant. However, there was no response from the appellant on this point in their advocates' letter. The appellant alone must shoulder the blame for any delay by withholding access to the units to remedy the defects when there was no longer a dispute by the respondent as to its obligation and liability to do so.

Condition (b) stemmed from non-payment by the appellant to the respondent of the sums overdue under interim certificate nos. 8, 9 and 10. *Vis-a-vis* the respondent, we noted that there was no provision in cl. 35 or in the GCC to withhold the issuance by ADP of those certificates named in the appendix to the agreement for work already done and materials delivered on site by the respondent; or, to withhold payment by the appellant which the respondent was entitled thereunder, which acts the appellant attempted to do by its letters dated 8 April 1997 and 30 April 1997 at pp. 129 and 135 of the appeal record. In the case of interim certificate nos. 8, 9 and 10, payment overdue was actually withheld from the respondent.

Condition (b) was the subject matter of the respondent's suit no: 22-108-97-III (II) pending disposal in Kuching High Court II at the time of the hearing of this appeal. Short of the appellant's consent, whether or not there would be prompt settlement of the certified sums depended on whether there was an application for summary judgment taken out by the respondent in the High Court and heard at the same time as the application for stay under s. 6 as in the case of *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd.* [1993] 3 MLJ 309 at p. 312 left column C. We declined to comment further on this topic as the only appeal before us was this present one against the dismissal of the appellant's application for a stay under s. 6. *Vis-a-vis* the appellant, as said earlier, under cl. 19 of the GCC the obligation and the liability to make good the defects were on the respondent. Hence no issue of conditon (b) arose. The respondent acknowledged such obligation and liability and the Architect's Instruction was issued on 14 April 1998. The respondent was duty bound to proceed on the Architect's Instruction in accordance with cl. 19.

It was common ground that there was no notice in writing of any dispute given under cl. 43. It was plain to us that from the date of issuance of the letter of demand to the date of issue of the writ, there was a period of six months. In our opinion, six months was more than ample time to give such notice and the appellant could not validly complain of lack of time or opportunity to give such notice. Under cl. 43 notice in writing shall be given "forthwith" to the other party: see *Pitchers Ltd v. Plaza (Queensbury) Ltd* [1940] 1 All ER 151 at p. 153E. However, its complaint was that the issuance of the writ took them by surprise because the respondent continued to negotiate and gave no prior notice to discontinue. In our view that was not a good excuse. The fact was that the letter of demand was issued and the last paragraph was in explicit terms namely, that "unless the sum of RM2,752,659.27 ... is paid to our client or to us as its solicitors within fourteen (14) days from the date hereof, we have firm instructions to commence legal proceedings against you **without further notice**."

As we read it, that letter gave final notice to the appellant. There was no payment made or reply given; nor was there any other correspondence by the appellant to show that the said notice had ceased to be operative, was waived or cancelled while negotiation was under way. Consequently, such notice continued to run and there was no need for the respondent to give any prior notice to discontinue with the negotiation.

In the premises we found no merit in the appellant's submission in point (ii).

Lastly, it was common ground that there was no deposition in the affidavit of Chan Chee Khuen affirmed on 15 January 1998 or in any subsequent affidavits to demonstrate to the judge that the appellant was when suit no: 22-108-97-III (II) was commenced and when the exercise of the court's discretion was sought for the grant of a stay that it was ready and willing to do all things necessary to the proper conduct of the arbitration. That was a requirement of s. 6 and our Malaysian case law: *Seloga Jaya Sdn. Bhd v. Pembenaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 CLJ 716 (SC).

We agreed with the submission of counsel for the respondent on this point. From his brief submission in writing, it was clear to us that counsel for the appellant confused willingness to let the respondent rectify the defects when the writ was taken out with willingness to do all things necessary to the proper conduct of the arbitration. The latter talked of submission to arbitration and compliance with the provision in cl. 43 for the appointment of a single arbitrator to be agreed uoon between the appellant and the respondent in accordance with and subject to the provisions of the Arbitration Ordinance (Sarawak) now superseded by Act 93. Counsel thus missed the point in point (iii) of his submission.

We agreed with the findings of the judge for the reasons given above. It seemed to us more likely than not that the lack of a notice under cl. 43 and of a statement of the appellant's readiness and willingness to do all things necessary for the proper conduct of the arbitration under s. 6 stemmed from a basic lack of dispute to be referred to arbitration.

In the light of those findings we were not satisfied that the appellant had complied with all the necessary conditions of s. 6 to invoke the jurisdiction of the High Court or of this court to stay the proceeding in suit no: 22-108-97-III (II). And as the appellant had not crossed the threshold, we needed to consider no further from here: see the postlude to *Seloga*'s case *(ibid)*.

For these reasons stated we upheld the decision of the judge and recorded our decision as in the opening paragraph of this judgment.